



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1814 OF 2016

ROBERT MOMANYI.....CLAIMANT

VERSUS

CATHOLIC UNIVERSITY OF EASTERN AFRICA.....RESPONDENT

JUDGMENT

1. The Claimant herein commenced suit vide a Memorandum of Claim filed on 6th September 2016 against the Respondent for the alleged unlawful termination of employment and violation of his right to fair labour practices. He avers that he was employed by the Respondent as a Laboratory Technician and that he worked for it with dedication and efficiency. The Claimant avers that vide a letter dated 22nd August 2013, the Respondent asked him to show cause why he should not be summarily dismissed on alleged serious cases of misconduct. The Claimant averred that the Respondent then terminated his contract of employment on 9th September 2013 citing as the reasons for termination, neglect of duties, irresponsibility, insincerity and lack of seriousness in the performance of his duties. The Claimant averred that the Respondent however did not furnish him with the full and specific particulars of the purported accusations nor did it prove the same. He averred that this makes the dismissal both procedurally and substantively unfair. He avers that during his employment he complained about numerous incidents of unfair labour practices visited upon him such as working overtime without being paid an allowance, being overworked, being denied annual leave and being assigned extra duties without corresponding remuneration. The Claimant avers that instead of addressing his complaints, the Respondent initiated disciplinary action against him that resulted in his unfair dismissal. He avers that he is therefore entitled to damages for the unfair labour practices and compensation amounting to twelve months' gross salary for unfair and unlawful termination of his employment. The Claimant filed his Witness Statement on 29th February 2019 wherein he states that he duly responded to the show cause letter vide his letter dated 26th August 2013. He asserts that he had never been disciplined or warned for any wrongdoing prior to the said show cause letter and denies the reasons for his termination as expressly stated by the Respondent in the letter of termination. He stated that he was earning a gross monthly salary of Kshs. 103,418/- at the time of his termination.

2. The Respondent filed a Memorandum of Defence dated 28th June 2017 admitting that it offered employment to the Claimant vide an appointment letter dated 30th November 2000. It avers that contrary to the Claimant's assertions, the Respondent's ICT technician had notified the Claimant of concerns about his coming to work late, absenteeism and evasiveness of duty. The Respondent averred that it also severally warned the Claimant on his conduct which would result in disciplinary action being taken against him. The Respondent avers that the notice to show cause issued to the Claimant clearly spelt out the cases of his alleged misconduct and that he was given ample time to set out his case and respond to the allegations considering his disciplinary meeting was on 2nd September 2013. The Respondent avers that the Claimant's letter of termination also set out the events that led to his dismissal together with reasons for the termination and that due procedure was followed. It further avers that contrary to the Claimant's allegations, he regularly proceeded on annual leave and was promptly paid accordingly whenever he worked overtime. It thus denies that the Claimant is entitled to any relief as alleged or otherwise and prays that the entire claim be dismissed with costs.

3. The Claimant testified that he is currently unemployed, is professionally an ICT Consultant and that he used to work for the Respondent between 2001 and 2013. He narrated that on Friday 22nd July 2013 he received a text message from the HR Manager informing him there was a letter and that he reported on Monday to get the letter which was a show cause why he should not be disciplined. He stated that he was forced to respond on the same Monday by 9.00am which to him was not sufficient time and that he was also not allowed to access the office as they had changed locks. The Claimant stated that he went home and was called later to explain and that he was eventually dismissed on 2nd September 2013 by a letter dated 9th September 2013. While referring to the letter of 25th June 2010 in the Respondent's bundle of documents, the Claimant testified that the same had never been served on him and that he was coming across the letter on that day. He stated that the letter of 1st July 2010 was also not served on him and in any case he was not working in the Faculty of Science or the labs in 2010 as at the date of the said letter and that he was working in the General ICT Office. The Claimant testified that he was deployed to the lab in May 2011 and worked in 3 labs each with 64 computers in different locations of about 100 metres apart, and that he used to run from lab to lab. He further testified that he could not go for leave due to the workload as he would be recalled immediately and that whenever he filled claim forms he would not get any payment. He stated that he started work at 6.30am and worked until 8.30pm and would work over lunch hour and on weekends to ensure that the labs are ready and that he also worked between 5.00pm and 7.00pm. He stated that he was also

required to attend court cases for students who stole, without facilitation and technical costs and asked the Court to give him interest from the date of judgment. He stated that as his medical cover did not cover his son, he had to pay cash and never received a refund from the Respondent and that he was treated unfairly as he was detained at work at the time.

4. The Respondent did not attend the hearing and upon satisfying itself that there was proper service the Court closed the defence case. The Claimant filed written submissions in support of his case. The Claimant submits that since the Respondent did not attend court on the hearing date, his evidence went unchallenged and that the Honourable Court ought to find that the claim has been proved to the required standard. He submits that failure to give him adequate time to respond to the show cause was in breach of the Respondent's Staff Disciplinary Procedures as contained in the Respondent's Human Resources Policies and Procedures Manual under Clause 3.2. The Claimant cites the case of **Michael Odhiambo Opiyo v Bidco Africa Limited [2021] eKLR** where the Court held that the 24-hour notice period was not sufficient to allow a proper defence to be mounted and neither was the process in line with the rules of natural justice. The Claimant relied on the case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**, where the Court stated that *"...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence..."* The Claimant submits that he was not given a hearing as per the law. He cited the case of **Julius Macharia Mwangi v Matanga Investments Limited [2019] eKLR**, where the Court dealt with a similar situation. He submitted that Section 41 provides that before an employee is terminated by an employer for poor performance, the employer shall give the employee an opportunity to be heard. The Claimant submitted that in view of the foregoing, this Court ought to find that the decision to terminate his contract of employment was both procedurally and substantively unfair. The Claimant further submits that he has pleaded how his constitutional right to fair labour practices was violated by the Respondent and proven the same and that he relies on the case of **Grace Gacheri v Kenya Literature Bureau [2012] eKLR** where the Court observed as follows:

"To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems.

The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."

5. On the claim for damages, the Claimant submits that he has proved that his contract of employment was unfairly terminated and that his constitutional right to fair labour practices was infringed. He opined that an award of Kshs. 1,500,000/- would be reasonable in the circumstances. He relies on the case of **County Government Workers Union v Narok County Government & Another [2021] eKLR** where Wasilwa J. awarded Kshs. 1,000,000/- as damages for breach of an employee's constitutional right to fair labour practices. The Claimant also cited the case of **Hesbon Nguruiya Waigi v Equatorial Commercial Bank Ltd [2013] eKLR**, where Mbaru J. awarded Kshs. 100,000/- to an employee whose salary was Kshs. 30,000/- per month, for breach of his constitutional right to fair labour practice. He submits that he is further entitled to one month's salary in lieu of notice as there is no dispute that his contract of employment was terminated without notice and that under Section 35(c) of the Employment Act, 2007, a notice of at least one month is implied in every contract of employment. The Claimant further submits that as his employment period at the Respondent is not in dispute and considering the length of service and the manner in which his contract was terminated, an award of 12 months' gross salary is reasonable compensation for loss of his employment. He relies on the case of **Peter Kamau Mwaura & Another v National Bank of Kenya [2020] eKLR** where the Court awarded the claimants 12 months' salary compensation after taking into account their long years of service of 27 and 16 years respectively and the fact that they were unable to secure alternative employment within a year after termination.

6. The Respondent did not participate at the hearing and the Claimant argues that his evidence went unchallenged. He asserts that the Honourable Court ought to find that the claim has been proved to the required standard. Whereas there was no appearance by the Respondent and whereas the Claimant's testimony went unchallenged, the Court cannot take his evidence as proved to the required standard on that score as pleadings by a party or the evidence adduced in support of a case are not gospel truths. The Court must weigh the evidence adduced and the facts of the case to come to a determination. If the contrary was true that automatically a case is proved because the evidence he gave is uncontroverted then the Court would be reduced to a rubber stamp and not elevated to its true calling which is a trier of facts and the harbinger of justice.

7. The Claimant asserts he was not given a hearing prior to his dismissal. Under Section 41 of the Employment Act, an employee is entitled to the safeguards under the Section. Section 41 provides that before an employee is terminated by an employer for poor performance, the employer shall give the employee an opportunity to be heard. The Claimant's testimony in relation to the application of this safeguard is that on Friday 22nd July 2013 he received a text message from the HR Manager informing him there was a letter for his attention. The Claimant testified that he reported on Monday to get the letter which was a show cause why he should not be disciplined. He stated that he was forced to respond on the same Monday by 9.00am which to him was not sufficient time and that he was also not allowed to access the office as they had changed locks. In his pleadings he had averred as follows:- *vide a letter dated 22nd August 2013, the Respondent asked him to show cause why he should not be summarily dismissed on alleged serious cases of misconduct.* The 22nd August 2013 was a Thursday and it does not make sense why the Respondent would require the Claimant to respond within a few hours on Monday as he alleges. If indeed his averments are to be accepted as statement of fact, the letter dated 22nd August 2013 did not get into his hands until 26th August 2013. He says he was called by the HR on Friday 23rd August 2013 and was told to collect a letter meant from him. He says he collected the letter on Monday. If that is the case the Claimant did not get adequate time to respond to the show cause by his own default as he did not deem it necessary to pick the letter on Friday or assuming he got the call after office hours on Friday, he did not collect the letter on Saturday. As such he cannot allege the fact that he chose to receive the letter on 26th August 2013 was an abridgement of his right to be heard. The Respondent despite its major flaw in not having a well thought out policy of resolution of matters performance, did issue a letter that would have accorded the Claimant sufficient time to give a response. In any event, the Claimant did not produce any evidence that he sought additional time to respond to the show cause letter. He asserts that he responded to the show cause within the short period. The requirement for a response on 26th August 2013 was not cast in stone since that letter of itself did not indicate that if he failed to respond on 26th August

2013 he would stand dismissed. He made an effort to defend himself and he asserts he did not have access to the documents he needed for the response. His own response to the show cause written on Monday 26th August 2013 did not contain any request for access to documents to defend himself.

8. On the matter of hearing the Claimant was emphatic that he had conducted himself in proper manner and had been not only keenly pointing out the failures of the Respondent in the provision of equipment and accessories in the computer labs. It is clear in the letter the Claimant complained of being asked to perform tasks between different offices and under very adverse conditions. He however did not avail a single letter or memo indicating the challenges he faced in running the operations under his docket. Whereas the Court believes the Claimant had adverse conditions at work through his demeanour and testimony in Court, employees have an obligation to notify the employer of adverse working conditions and not merely acquiesce to the conditions at work without a murmur and then come to Court to lament how poorly they were treated yet they did not document any grievance with their employer. Having said that I have weighed his testimony against the averments of the Respondent and find that the Respondent was overambitious in having 3 computer labs to be manned by one computer technician. There was no way the Claimant could competently handle the work of 3 lab technicians especially given the fact that the labs were in use at the same time and were located at different geographical locations on campus. As such there was no valid reason for dismissal and the Respondent failed to prove there was any. The Claimant has proved unfair termination in terms of Section 45 of the Employment Act for which he is entitled to recover compensation. The Claimant had sought payment for overtime but the Respondent availed proof the Claimant was paid for the overtime he worked. This aspect of the claim fails. He also asserted he was denied annual leave but the Respondent availed leave forms duly approved as proof the Claimant went on leave. The Claimant therefore is only entitled to the following declaration:- that there was unfair dismissal of the Claimant and for which he will receive 2 months salary as compensation as well as costs of the suit. He did not prove abridgement of the right to fair labour practices entitling him to compensation for such alleged infringement. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- i. Compensation of 2 month's salary Kshs. 206,836/-
- ii. Costs of the suit
- iii. The sum in i) above shall be subject to statutory deductions.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2021

NZIOKI WA MAKAU

JUDGE